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No. 10

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES HENRY MCELROY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *United States v. Ruiz*, 536 U.S. 622 (2002), authorizes the prosecution to suppress favorable evidence material to punishment where the defendant pleads guilty without an agreed recommendation on punishment.

2. Whether undisclosed evidence that would have impeached the complainant's statements contained in the pre-sentence report is material to punishment.

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PETITION FOR A WRIT OF CERTIORARI

James Henry McElroy respectfully petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals.

OPINIONS BELOW

The findings of fact and conclusions of law of the 179th District Court of Harris County are not reported (Appendix A). The order of the Texas Court of Criminal Appeals denying habeas corpus relief based on the trial court's findings of fact and conclusions of law is not reported (Appendix B).

JURISDICTION

The Texas Court of Criminal Appeals denied habeas corpus relief on October 8, 2008. This petition is being filed within 90 days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part, "No person shall be . . . deprived of . . . liberty . . . without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . ."

STATEMENT OF THE CASE

A. Summary Of The Issues

Petitioner pled guilty to sexual assault, and the court recessed the proceedings for preparation of a pre-sentence report (PSR). The PSR contained the complainant's statement to a deputy that petitioner forced her into his truck and, after they went to the grocery store, compelled her to perform oral sex on him. It also contained her more detailed statement to the probation officer that they had a platonic relationship and she accompanied him on the night in question because she had a few drinks and trusted him. It contained petitioner's statement to another deputy that he saw the complainant, whom he knew, walking down the street, offered her a ride, noticed that she had a crack pipe, and made her throw it away before she entered his truck; when he refused her request to take her to a particular apartment complex, she took off her clothes, exited the truck, and ran away screaming. It also contained his statement to the probation officer that he met the complainant on several previous occasions, including at a bar and a bikers' rally; that she accepted a ride and asked him to take her to an apartment complex to

buy drugs on the night in question; that, when he refused to do so, she got mad, took off her clothes, and jumped out of the truck; and that, in his opinion, she made the accusation because she was afraid of her husband and needed an excuse for being out late. Thus, whether the complainant was smoking crack cocaine and asked petitioner to take her to buy drugs was material to sentencing. The court sentenced petitioner to ten years in prison.

Petitioner filed a state habeas corpus application alleging that he was denied due process of law because the prosecutor failed to disclose contradictory statements that the complainant made to him and to correct her false and misleading statements in the PSR. The prosecutor testified at the evidentiary hearing that he interviewed the complainant while the case was pending. He told her that her story about how she ended up in petitioner's truck did not make sense, that he did not believe her, and that he did not think that a jury would believe her. When she persisted in her story, he said that he would probably have to dismiss the case unless he could explain to a jury why she was with petitioner. She then admitted that she had previously smoked crack cocaine on a motorcycle ride with petitioner while he drank whiskey; that she had previously pawned a ring to buy crack cocaine and that he retrieved it and returned it to her about three weeks before the night in question; and that there were at least two other occasions on which she had smoked crack cocaine in his presence. Instead of disclosing what she told him to defense

counsel, the probation officer, or the court, the prosecutor told defense counsel that he would not oppose probation if petitioner pled guilty without an agreed recommendation on punishment. Thereafter, when the court assessed ten years, it did not know about the complainant's statements to the prosecutor, which tended to corroborate petitioner's statements to the deputy and the probation officer.

The state trial court concluded that the prosecution has no duty to disclose favorable evidence material to punishment, as *Brady v. Maryland*, 373 U.S. 83 (1963), does not apply where the defendant pleads guilty in light of *United States v. Ruiz*, 536 U.S. 622 (2002). It further found and concluded that, even if *Brady* applied, the prosecutor had no duty to disclose the complainant's prior inconsistent statements and use of crack cocaine, as this evidence "was not material at sentencing, would not have been admissible, and would not have mitigated punishment." The Court of Criminal Appeals denied relief without written order based on the trial court's findings of fact and conclusions of law.

The Court should grant certiorari to clarify that *Brady* prohibits the prosecution from suppressing favorable evidence material to punishment where the defendant pleads guilty without an agreed recommendation on punishment. *Ruiz* held that a guilty plea is not rendered involuntary where the prosecution failed to disclose impeachment evidence relating to its informants and witnesses prior to entry of the plea. The suppressed evidence in *Ruiz* was relevant to

guilt-innocence and not to punishment. Most important, *Ruiz* did not overrule *Brady* and does not authorize the prosecution to suppress evidence material to punishment where the defendant pleads guilty without an agreed recommendation on punishment. Furthermore, this Court clearly held in *Townsend v. Burke*, 334 U.S. 736 (1948), that it violates due process for the sentencer to assess punishment on the basis of materially false information. Thus, the prosecutor had a duty to correct the complainant's false statements contained in the PSR prior to sentencing.

B. Procedural History

Petitioner pled guilty to sexual assault in cause number 1047063 in the 179th District Court of Harris County, Texas, before the Honorable J. Michael Wilkinson. Following a presentence investigation, the court sentenced him to ten years in prison on July 14, 2006. He did not appeal. Kenneth Junck represented him.

Petitioner filed a state habeas corpus application on April 9, 2007, and filed an amended application on December 7, 2007. Judge Wilkinson voluntarily recused himself. Carol Davies, a visiting judge, presided at an evidentiary hearing and entered findings of fact and conclusions of law recommending that relief be denied (Appendix A). The Court of Criminal Appeals denied relief without written order on October 8, 2008. *Ex parte McElroy*, No. WR-70, 481-01 (Tex. Crim. App. 2008) (Appendix B).

REASONS FOR GRANTING THE PETITION

I. THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT THE PROSECUTION HAS NO DUTY TO DISCLOSE FAVORABLE EVIDENCE MATERIAL TO PUNISHMENT WHERE THE DEFENDANT PLEADS GUILTY WITHOUT AN AGREED RECOMMENDATION ON PUNISHMENT.

The complainant, a married woman with children, told a deputy that, about 3:00 a.m. on November 13, 2005, petitioner came to her home to bring her tequila, forced her into his truck, and drove to a grocery store to purchase items for his girlfriend. After they left the store, he parked on the street, grabbed her hair, forced her head into his lap, and compelled her to perform oral sex on him. She exited the truck, ran to a nearby residence, and called the police (C.R. 42-43).

Another deputy went to petitioner's home. Petitioner said that he saw the complainant, whom he knew, walking down the street, offered her a ride, noticed that she had a crack pipe, and made her throw it away before she entered his truck. When he refused her request to take her to a particular apartment complex, she took off her clothes, exited the truck, and ran away screaming (C.R. 43-44).

Petitioner was indicted for sexual assault (C.R. 66). He hired Kenneth Junck to represent him (3 R.R. 19). Prosecutor Dorian Cotlar proposed a plea bargain

that, if petitioner pled guilty without an agreed recommendation on punishment and allowed the court to assess punishment following a pre-sentence investigation, he would stand silent and not oppose probation (2 R.R. 24-25). Petitioner accepted the offer and pled guilty without an agreed recommendation on punishment on May 12, 2006; the court recessed the proceedings for preparation of a PSR (C.R. 258-59).

The PSR contained the complainant's statement to the deputy that petitioner forced her into his truck and, after they went to the grocery store, compelled her to perform oral sex on him (C.R. 47). It also contained her more detailed statement to the probation officer that she first met petitioner when he stopped his motorcycle and spoke to her as she was watering her yard; that he came by her home several months later to ask about buying a vehicle, and she gave him her telephone number; that they spoke regularly on the phone about her children and parents, his friends, cooking, and biking; and that she accompanied him on the night in question because she had a few drinks and trusted him (C.R. 49-50).[1] The complainant did not tell the probation officer that her relationship with petitioner involved drugs or that she had been smoking crack cocaine and

[1] The probation officer did not ask the complainant why she told a deputy that petitioner forced her into his truck if, in fact, she accompanied him willingly because she had been drinking and trusted him.

asked him to take her to buy drugs on the night in question (3 R.R. 14-16).

The PSR contained petitioner's statement to the probation officer that he met the complainant on several previous occasions, including at a bar and a bikers' rally; that she accepted a ride and asked him to take her to an apartment complex to buy drugs on the night in question; that, when he refused to do so, she got mad, took off her clothes, and jumped out of the truck; and that, in his opinion, she made the accusation because she was afraid of her husband and needed an excuse for being out late (C.R. 48-49).

The court found petitioner guilty and sentenced him to ten years in prison on the basis of a PSR reflecting the complainant's assertions that they had a platonic relationship and she accompanied him on the night in question either because he forced her into his truck or because she had been drinking and trusted him, and his assertion that she made a false accusation because she had been smoking crack cocaine and got mad when he would not take her to buy drugs. Thus, whether the complainant was smoking crack cocaine and asked petitioner to take her to buy drugs was material to sentencing.

Cotlar disclosed to present counsel during the habeas investigation that the complainant told him that petitioner had supplied her with crack cocaine on two or three occasions in the hope of having sex (C.R.

145).[2] Petitioner filed a motion requesting that the trial court order the State to produce any evidence that would show that the prosecution was aware at the time of sentencing that the complainant had used crack cocaine on the night in question or had previously obtained crack cocaine from petitioner (C.R. 35-37). The court ordered the State to disclose Cotlar's handwritten notes of an interview with the complainant on April 20, 2006, which reflected that she "had smoked crack at some point" and that she had a relationship with petitioner that involved drugs (C.R. 146-49).[3] Following the disclosure of these notes, Judge Wilkinson ordered an evidentiary hearing and recused himself because of his friendship with Cotlar. Judge Davies presided at the hearing.

Cotlar testified that he interviewed the complainant on April 20, 2006 (2 R.R. 14-15). He told her that her story about how she ended up in petitioner's truck did not make sense, that he did not believe her, and that he did not think that a jury would believe her (2 R.R. 15). When she persisted in her story, he said that he would probably have to dismiss the case unless he could explain to a jury why she was with petitioner (2 R.R. 15-16). She then admitted that she had previously smoked crack cocaine on a motorcycle

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[2] This information, which Cotlar provided without reviewing the notes of his interview with the complainant, proved to be incorrect.

[3] Cotlar asserted in an affidavit that he believed that the complainant used cocaine on the night in question (C.R. 157).

ride with petitioner while he drank whiskey; that she had previously pawned a ring to buy crack cocaine and that he retrieved it and returned it to her about three weeks before the night in question; and that there were at least two other occasions on which she had smoked crack cocaine in his presence (2 R.R. 16-17, 19). Cotlar made written notes of the interview (C.R. 146-47). He did not disclose the interview notes or their content to Junck, the probation officer, or the court (2 R.R. 22-23).[4] The complainant did not want to testify because it would destroy her marriage if her husband and children found out that she had used crack cocaine, had a relationship with petitioner, and accompanied him at 3:00 a.m. (2 R.R. 20-21).

Cotlar concluded after this conversation that petitioner should receive probation, but he could not obtain permission from his supervisors to offer it (2 R.R. 25). Instead of disclosing to Junck what the complainant told him, he said that he would not oppose probation if petitioner pled guilty without an agreed recommendation on punishment (2 R.R. 24). They met with Judge Wilkinson and reached a tacit understanding that petitioner probably would receive probation following a pre-sentence investigation

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[4] Cotlar did not feel obligated to disclose the interview notes pursuant to *Brady v. Maryland* even though Junck told him that petitioner maintained that the complainant was a "crackhead" (2 R.R. 23-24).

(2 R.R. 26-27).[5] Petitioner pled guilty on May 12, 2006, and the court recessed the proceedings for preparation of a PSR (C.R. 258-59).[6]

Cotlar skimmed the PSR before the sentencing hearing (2 R.R. 28-29). When he read that petitioner denied committing the offense, he told Junck that petitioner was going to prison (2 R.R. 32). The PSR contained the complainant's statements to the deputy and the probation officer but not her statements to Cotlar acknowledging that she had a relationship with petitioner that involved drugs (2 R.R. 29-31). Cotlar asserted that he did not read those portions of the PSR but that, if he had, he would have "cleared it up" and disclosed to the court what she told him (2 R.R. 30, 32-33).

Junck testified that Cotlar did not disclose the notes of his interview with the complainant or their content; had he done so, Junck would have made sure that the court knew about her statements prior to sentencing (3 R.R. 27-30).

Petitioner contended that the State's failure to disclose the complainant's statements to Cotlar and

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[5] Cotlar told Junck that petitioner would have to accept responsibility for the offense during the interview with the probation officer (2 R.R. 25-26).

[6] Cotlar wrote an email to habeas counsel that the plea without an agreed recommendation for deferred adjudication probation "was made with a wink and a nod" between Judge Wilkinson, Junck, and him (C.R. 145).

to correct her false and misleading statements in the PSR denied him due process of law. *See* U.S. CONST. amends. V and XIV. The state trial court concluded that the prosecution has no duty to disclose favorable evidence material to punishment, as *Brady v. Maryland* does not apply where the defendant pleads guilty in light of *United States v. Ruiz*.[7] The Court of Criminal Appeals denied relief without written order based on the trial court's findings of fact and conclusions of law. The state court decision constitutes an affront to *Brady* and its progeny.

Suppression by the prosecution of evidence favorable to the accused violates due process where the evidence "is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. at 87. Brady testified that he participated in the crime but that the co-defendant did the actual killing. The jury convicted and sentenced him to death. This Court ordered a new trial on punishment because the prosecution suppressed the co-defendant's statement that he did the killing. Thus, *Brady* expressly requires the prosecution to disclose favorable evidence material to punishment. *See United States v.*

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[7] Coincidentally, the day before the court entered the findings of fact and conclusions of law, two prosecutors in the Harris County District Attorney's Office published a paper entitled, "The State's Obligations Under *Brady v. Maryland*," for use in a training session. They acknowledge in the paper that prosecutors have a duty to disclose evidence that could be used to impeach a witness or mitigate the punishment (C.R. 254-57).

Weintraub, 871 F.2d 1257, 1264-65 (5th Cir. 1989) (new sentencing hearing required where prosecution suppressed evidence relevant to amount of narcotics sold); *United States v. Severson*, 3 F.3d 1005, 1012-13 (7th Cir. 1993) (new sentencing hearing required where prosecution suppressed evidence relevant to whether defendant accepted responsibility for offense).

Ruiz does not alter the application of *Brady* to evidence that mitigates the punishment where the defendant pleads guilty without an agreed recommendation on punishment. *Ruiz* held that a defendant's guilty plea is not rendered involuntary where the prosecution failed to disclose impeachment evidence relating to its informants and witnesses prior to entry of the plea. 536 U.S. at 633. It did not involve the suppression of evidence that would mitigate the punishment. Nor did this Court suggest that the prosecution is entitled to suppress evidence that would mitigate the punishment where the defendant pleads guilty without an agreed recommendation on punishment. Furthermore, two years after this Court decided *Ruiz*, it concluded that the suppression of evidence that a prosecution witness was a paid police informant adversely affected "the reliability of the jury's verdict regarding punishment." *Banks v. Dretke*, 540 U.S. 668, 703 (2004).

Ruiz did not overrule *Brady* and does not authorize the prosecution to suppress evidence material to punishment where the defendant pleads guilty without an agreed recommendation on punishment. It is

illogical and unfair to have a rule of law that, where one defendant pleads not guilty and the co-defendant pleads guilty, both are convicted, and the prosecution suppressed favorable evidence material to punishment, the defendant who pled not guilty is entitled to a new sentencing hearing but the co-defendant is not, simply because he pled guilty. The Court should grant certiorari to clarify that *Brady* prohibits the prosecution from suppressing favorable evidence material to punishment where the defendant pleads guilty without an agreed recommendation on punishment. SUP. CT. R. 10(a) and (c).

II. THE TEXAS COURT OF CRIMINAL APPEALS ERRED IN HOLDING THAT UNDISCLOSED EVIDENCE THAT WOULD HAVE IMPEACHED THE COMPLAINANT'S STATEMENTS CONTAINED IN THE PRE-SENTENCE REPORT IS NOT MATERIAL TO PUNISHMENT.

The state trial court further found and concluded that, even if *Brady* applied, Cotlar had no duty to disclose the complainant's prior inconsistent statements and use of crack cocaine, as this evidence "was not material at sentencing, would not have been admissible, and would not have mitigated punishment" (C.R. 240). This decision is totally unsupported by the evidence presented in the habeas proceeding. The complainant's statements to the deputy and the probation officer were included in the PSR. Had Cotlar disclosed her contradictory statements, Junck

would have informed the court to demonstrate the falsity of specific statements attributed to her in the PSR. "Admissibility" is not an issue where the court assesses punishment on the basis of a PSR. The ultimate issue is whether there is a reasonable probability that Judge Wilkinson would have assessed less than ten years had he known about this evidence. Judge Davies's conclusion that the undisclosed evidence was not mitigating is meaningless in view of the fact that she did not assess the punishment.

The prosecution has a duty to disclose favorable evidence, even if it was not requested or was requested only in a general way, if the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs*, 427 U.S. 97, 108 (1976). Regardless of any defense request, favorable evidence is material, and constitutional error results from its suppression by the prosecution, if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

A showing of materiality does not require the defendant to prove that the disclosure of the evidence or impeachment of the false statements would have resulted in a lesser sentence. The question is not whether the defendant probably would have received a different verdict, but whether he received a fair trial, understood as a trial resulting in a verdict

worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

The knowing use of false testimony by the prosecution violates due process. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). The prosecutor has a duty to correct false testimony that is relevant to the credibility of a witness. *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959). The defendant must show that the testimony was false, the prosecution knew it, and the testimony was material.

Conceptually, there is no difference between false testimony given at a sentencing hearing and false statements contained in a PSR. This Court has clearly held that it violates due process for the sentencer to assess punishment on the basis of materially false information. *Townsend v. Burke*, 334 U.S. at 740-41; *United States v. Tucker*, 404 U.S. 443, 447-48 (1972). It observed that Townsend "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law. . . ." *Townsend*, 334 U.S. at 741.

Judge Wilkinson sentenced petitioner, a 63-year-old first offender who was eligible for probation, to ten years in prison on the basis of a PSR reflecting the complainant's assertion that they had a platonic relationship and she accompanied him either because he forced her into his truck (as she told a deputy that night) or because she had been drinking and trusted

him (as she later told the probation officer), and petitioner's assertion that she made a false accusation because she was smoking crack cocaine and got mad when he would not take her to buy drugs. Whether the complainant was smoking crack cocaine and asked petitioner to take her to buy drugs was material to sentencing. The complainant's statements to Cotlar demonstrate that she lied to the probation officer about the nature of her relationship with petitioner and that the PSR falsely represented that relationship. Nonetheless, Cotlar failed to disclose what she told him to Junck, the probation officer, or the court. The court sentenced petitioner to ten years in prison on the basis of false, incomplete, and misleading information in the PSR. There is a reasonable probability that it would have assessed less than ten years had it known about the complainant's statements to Cotlar, which tended to corroborate petitioner's statements to the deputy and the probation officer. Thus, the undisclosed evidence was material to punishment. The Court should grant certiorari to determine whether undisclosed evidence that would have impeached the complainant's statements contained in the PSR is material to punishment. SUP. CT. R. 10(a) and (c).

CONCLUSION

Petitioner requests that the Court grant the petition for a writ of certiorari, vacate the judgment, and order a new sentencing hearing.

Respectfully submitted,

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APPENDIX A

Cause No. 1047063-A

EX PARTE	§	IN THE 179TH
	§	DISTRICT COURT
JAMES HENRY MCELROY,	§	OF HARRIS COUNTY,
Applicant	§	TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Jul. 11, 2008)

This case is before the Court pursuant to James Henry McElroy's application for writ of habeas corpus under TEX. CODE CRIM. PROC. art. 11.07. McElroy, hereafter applicant, challenges his sexual assault conviction and claims he was denied the effective assistance of counsel and subjected to prosecutorial misconduct. The convicting court, presided over by the Honorable Carol Davies, on May 29 and 30, 2008, conducted an evidentiary hearing to resolve the allegations presented by applicant.

The Court, having considered testimony adduced during the evidentiary hearing, the official court documents and records in cause number 1047063 and 1047063-A, along with the applicable law, is of the opinion that applicant is not entitled to the relief he seeks. Applicant was not denied constitutionally effective assistance of counsel and was not subjected to prosecutorial misconduct. The Court recommends that relief be denied and makes the following findings of fact and conclusions of law.

I. PROCEDURAL HISTORY

The State charged applicant with sexually assaulting Tammy Siddique. Applicant pled guilty, the Community Supervisions and Corrections Department ("CSCD") prepared a pre-sentence investigation ("PSI") report, and the Court, in July 2006, assessed applicant's punishment at confinement in prison for ten years and a $5,000 fine. CSCD interviewed the victim, Siddique, while preparing the pre-sentence investigation. Siddique's statement to CSCD was inconsistent with the statement she had made to police some months before. The PSI report reflected both statements.

On April 9, 2007, applicant filed an application for writ of habeas corpus under TEX. CODE CRIM. PROC. art. 11.07. The convicting court conducted an evidentiary hearing to resolve applicant's claims on May 29, May 30, 2008. Kenneth Junck, who served as applicant's trial counsel, and Dorian Cotlar, who represented the State, testified about their, involvement in applicant's prosecution.

II. THE MERITS

The issues this Court is called upon to resolve are whether Junck's legal representation denied applicant constitutionally effective assistance of counsel during his trial, *see Strickland v. Washington,* 466 U.S. 668, 687 (1984), and whether the prosecutor engaged in misconduct by failing to disclose favorable evidence. *See Brady v. Maryland,* 373 U.S. 83 (1963).

A. The standard of review concerning ineffective assistance claims

This Court will employ the standard of review for evaluating claims of ineffective assistance of counsel is set forth in the familiar *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the *Strickland* two-pronged standard, applicant must demonstrate: (1) his trial counsel's performance was deficient, because it fell below an objective standard of reasonableness; and (2) there was a reasonable probability that, but for counsel's performance, the proceedings' result would have differed. *Strickland,* 466 U.S. 668. That is to say, defense counsel was not functioning as "counsel," guaranteed by the Constitution and that counsel's deficient performance prejudiced the defense. *Id.*; *Valencia v. State,* 946 S.W.2d 81, 83 (Tex. Crim. App. 1997); *Rodriguez v. State,* 899 S.W.2d 658, 664 (Tex. Crim. App. 1995). Moreover, whether, the *Strickland* test has been met is to be judged by the totality of the representation, not by isolated acts or omissions. *Rodriguez,* 899 S.W.2d at 665.

B. Trial counsel rendered effective assistance of counsel

The Court believes, based on the record, that Junck was sufficiently prepared and sufficiently advised applicant. Applicant retained Junck to represent him in this case, and Junck had represented applicant in another sexual assault case. Junck had a good working relationship with applicant and enjoyed free and open communication with him. Applicant

appeared in court with Junck on at least five occasions before pleading guilty plea, and while applicant was free on bond, he met with Junck in Junck's office on at least two occasions. Further, Junck spoke with applicant several times by phone. Junck discussed, the facts of the case, including Siddique's allegations, on numerous occasions with applicant, and Junck investigated the case and interviewed witnesses suggested by applicant.

Applicant told Junck he did not want to go to trial and asked Junck negotiate a plea-bargained agreement with the State. Toward that end, Junck met with prosecutor Cotlar. Cotlar told Junck he would not agree to probation, but suggested that applicant could plead guilty to the Court without an agreed recommendation as to punishment, subject to a PSI, and that the trial court could possibly sentence the applicant to deferred adjudication probation. Junck discussed this option with applicant, and applicant ultimately decided to plead guilty to the Court without an agreed recommendation as to punishment, subject to a PSI, and have the court assess punishment. Junck told applicant about the PSI process and told him that he needed to tell the truth in the PSI interview and accept responsibility for sexually assaulting Siddique. Junck believed that applicant would accept responsibility for sexually assaulting Siddique and did not accompany applicant to the PSI interview.

The Court believes Junck's advice to applicant regarding applicant's decision to plead guilty and

Junck's decision not to accompany applicant to his PSI interview were reasonable. The Court is of the opinion that applicant understood the nature of his plea and the PSI process, and Junck properly admonished applicant as to the consequences of his decision to plead guilty. Applicant understood his right to trial, and he freely, knowingly and voluntarily waived that right. Moreover, Junck never told applicant that the only way he could get probation was to plead guilty to the Court. The Court concludes Junck provided applicant with a rational and factual understanding of his chances of receiving probation.

C. The applicant's burden concerning prosecutorial misconduct claims based on *Brady*

In *Brady v. Maryland,* the Supreme Court created what amounts to a federal constitutional right to certain minimal discovery." 42 George E. Dix & Robert O. Dawson, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 22.21, and the Court of Criminal Appeals has interpreted article I, section 19 of the Texas Constitution to give a defendant the same rights he enjoys under *Brady* and its progeny. *See Ex parte Adams,* 768 S.W.2d 281, 293 (Tex. Crim. App. 1989).

To invoke *Brady*, a defendant must present evidence that: (1) the prosecution suppressed or withheld evidence; (2) the evidence would have been favorable to the accused; and (3) this evidence would

have been material to the defendant's defense. *Cruz v. State,* 838 S.W.2d 682, 686 (Tex. App.-Houston [14th Dist.] 1992, pet. ref'd) (*citing Moore v. Illinois,* 408 U.S. 786, 794-95 (1972)). The defendant has the burden of showing that, in light of all the evidence, it is reasonably probable that the outcome of the trial would have been different had the prosecutor made a timely disclosure. *Hampton v. State,* 86 S.W.3d 603, 612 (Tex. Crim. App. 2002).

Further, the Supreme Court has held that *Brady* does not apply to a guilty plea. *See United States v. Ruiz,* 536 U.S. 622 (2002).

D. The applicant was not subjected to prosecutorial misconduct.

Applicant claims the prosecutor engaged in misconduct by not disclosing to Junck that Siddique had made inconsistent statements to him and admitted to using drugs in the past. The Court finds applicant's prosecutorial misconduct claims unpersuasive.

1. *Brady* did not apply to applicant's PSI hearing because applicant waived his right to a trial and pled guilty.

A defendant who pleads guilty is not entitled to the same kinds of due process protections with, regard to evidence disclosure as someone who demands a contested trial. *See United States v. Ruiz,* 536 U.S. 622, 630 (2002) ("this Court has found that

the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor"). By pleading "guilty," a defendant waives his right to a contested trial, although the trial court might permit evidence contesting guilt in its discretion.

Because applicant pled guilty to the allegations in the indictment, that he sexually assaulted Siddique, he waived his right to a contested trial and *Brady* should not apply. The Court concludes that *Brady* imposed no duty on the prosecutor to disclose Siddique's inconsistent statements or admitted drug-usage history.

2. Even if *Brady* applied, the prosecutor had no duty to disclose Siddique's inconsistent statements and drug-usage history.

Siddique told Cotlar that she'd known applicant prior to the sexual assault and that she'd used drugs in the past. Siddique had never denied using drugs to anyone involved in the sexual assault's investigation and never admitted to using drugs on the night of the sexual assault. Cotlar did not tell Junck about his conversation with Siddique before the PSI hearing; he did not believe that Siddique's admission to smoking

crack cocaine in applicant's presence on prior occasions constituted favorable evidence that he was obligated to disclose to Junck. Cotlar did not believe Siddique's drug-usage history was relevant to the sexual assault. The Court is of the opinion that Siddique's drug-usage history was not material at sentencing, would not have been admissible, and would not have mitigated punishment.

In her statement to police, which was included in the PSI report, Siddique told police applicant had forced her into his truck before sexually assaulting her. Siddique's subsequent statement to the PSI interviewer was inconsistent with the statement she'd given police. The PSI report indicates Siddique acknowledged that she'd been drinking alcohol before the sexual assault, and that she accompanied applicant willingly because she trusted him. The Court believes this inconsistency was not material and would not have mitigated punishment. Furthermore, the inconsistency was contained in the PSI Report, which was considered by the Court and provided to Junck prior to sentencing.

The inconsistencies in Siddique's statements are apparent from a plain reading of the PSI report and do not constitute favorable evidence that the prosecutor was obligated to disclose to the defense assuming *arguendo* he had a duty under *Brady*.

III. CONCLUSION

Applicant has not met his burden of proving by a preponderance of the evidence that he was denied the effective assistance of counsel. The Court reaches this conclusion after having evaluated the record and all the pleadings before it. The Court believes applicant was afforded constitutionally effective representation and that counsel's actions and/or inactions were objectively reasonable.

Junck did not allow applicant to plead guilty knowing that applicant would assert his innocence or that applicant would not accept responsibility for committing the offense. Junck's decision not to accompany applicant to the PSI interview was reasonable and was not deficient conduct.

In light of the foregoing, applicant has failed to show that Junck's actions were not based on sound trial strategy or that, by a preponderance of the evidence, there is a reasonable probability that the proceeding's result would have been different but for Junck's conduct. The totality of Junck's representation was constitutionally sufficient.

Additionally, the prosecutor had no duty under *Brady* to disclose evidence because applicant pled guilty. Assuming *arguendo* that *Brady* did apply, applicant has not met his burden of showing that the prosecutor withheld favorable and material evidence. Siddique's undisclosed drug-usage and relationship with applicant did not impact the sentence assessed. Further, the drug-usage and relationship

with applicant were apparent from the PSI report, which was made available to applicant and was reviewed by the Court prior to sentencing.

Because the totality of Junck's representation was constitutionally sufficient, and the prosecutor did not engage in misconduct, applicant was afforded a fair trial. Accordingly, the Court recommends relief be denied.

SIGNED this 11 day of July, 2008.

/s/ Carol Davies
CAROL DAVIES
Judge, 179th District Court
Harris County, TEXAS

[SEAL]

Cause No. 1047063-A

EX PARTE	§	IN THE 179TH
	§	DISTRICT COURT
JAMES HENRY MCELROY,	§	OF HARRIS COUNTY,
Applicant	§	TEXAS

ORDER

(Filed Jul. 11, 2008)

The Court **ORDERS** the clerk to prepare a transcript of all papers in cause number 1047063-A and transmit the transcript to the Court of Criminal Appeals as provided by TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3. The transcript shall include certified copies of the following documents:

A. the original and supplemental applications for writ of habeas corpus, together with all attachments;

B. the Respondent's original answer;

C. the affidavits and exhibits filed herein;

D. the Court's order;

E. the appellate record in cause number 1047063;

F. the Court's Findings of Fact and Conclusions of Law; and

G. the respondent's and the applicant's Proposed Findings of Fact and Conclusions of Law.

The Court further **ORDERS** the clerk to send a copy of this order to the applicant and to the State.

Signed on this 11 day of July, 2008.

/s/ Carol Davies
CAROL DAVIES
Judge, 179th District Court
Harris County, TEXAS

[SEAL]

APPENDIX B

[SEAL] TEXAS COURT OF CRIMINAL APPEALS

Case # WR-70,481-01 -> Event: ACTION TAKEN

Event Information:

Event Type:	ACTION TAKEN
Description:	Application for Writ of Habeas Corpus – 11.07
Date:	10/8/2008
Disposition:	HC denied W/O written order on TC Fndgs-with Hear

Opinion Written: